Supreme Court, U.S.
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No. 92-1328

IN THE

Supreme Court of the United States

October Term, 1992

HARVEY GORDON,

Petitioner,

v.

STATE OF FLORIDA, K-MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

Respondents restate the questions presented as follows:

1. WHETHER § 768.73(2)(b), FLA.STAT. (1991) REQUIRING SIXTY PERCENT (60%) OF ANY AWARD FOR PUNITIVE DAMAGES BE MADE PAYABLE TO EITHER THE STATE GENERAL REVENUE FUND OR THE PUBLIC MEDICAL ASSISTANCE TRUST FUND CONSTITUTES A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE TAKING CLAUSE OF THE FIFTH AMENDMENT?

2. WHETHER § 768.73(2)(b), FLA.STAT. (1991), VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT?

3. WHETHER § 768.73(2)(b), FLA.STAT. (1991), CONSTITUTES A DEPRIVATION OF A CLAIMANT'S PROPERTY WITHOUT SUBSTANTIVE DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT?

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3. WHETHER § 768.73(2)(b), FLA.STAT. (1991), CONSTITUTES A DEPRIVATION OF A CLAIMANT'S PROPERTY WITHOUT SUBSTANTIVE DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT?

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STATEMENT OF THE CASE

Petitioner's statement of the procedural history of this case is essentially accurate. Respondent disagrees, however, with the inappropriate characterization by Petitioner in his first paragraph of what this case illustrates, paradigmatically or otherwise. Punitive damages are dependent upon the legislative largesse of the State and serve certain societal values which have nothing to do with compensating injured tort claimants. The fact that under Florida law plaintiffs and their lawyers may have somewhat less incentive to seek such damages may itself serve certain social interests, may be a point lost on Petitioner. In any case, the fact that Petitioner is no longer happy with the size of the carrot is entirely irrelevant to an appropriate statement of the case.

SUMMARY OF ARGUMENT

Review of the decision of the Florida Supreme Court is unwarranted because under Florida law there is no property interest in punitive damages, and therefore no federal Constitutional provision is violated by a state statute which permits a tort claimant to receive only a portion of such damages imposed against a tortfeasor in the appropriate case. Petitioner continues to misapprehend the fundamental nature of the punitive damage "sharing" statue by characterizing the law as requiring "an injured Florida tort claimant to pay to the state 60% of any award for punitive damages recovered by him...." (Petition at 8). It is Florida law that permits the imposition of the punitive penalty under certain circumstances. The "sharing" the State permits with a plaintiff still provides an incentive to the plaintiff for seeking to further the social policy of punishing egregious misconduct. It may also provide a disincentive for suits that are predicated largely upon the hope of recovering punitive damages. In any event, the injured tort claimant does not pay the punitive award, the Defendant does. The fact that Petitioner is not happy with his share of the punitive award is entirely irrelevant to any constitutional concerns.

In this case, the trial judge, after appeal on other issues, properly amended the final judgment to make sixty percent (60%) of the punitive damage award payable to the State General Revenue Fund as required by Section 768.73(2)(b), Fla.Stat. (1991). This statute was in effect prior to the accrual of Petitioner's cause of action on the underlying tort claim. The trial judge acknowledged in her order that it was her mistake not to have so provided in the original final judgment. Florida decisional law recognizes that a final judgment may be properly amended after an appellate mandate has been issued, and the appellate courts of

Florida have also recognized that leave of the appellate court is not necessary where the amendment is properly made pursuant to Rule 1.540(b), Fla.R.Civ.P. The motion to amend was timely, as it was made within one year of the post-trial orders entered by the trial court. Further, under Florida law, punitive damages may be entirely abolished by the Legislature without constitutional implications.

The provisions of Section 768.73(2), Fla.Stat. (1991), do not constitute an unlawful taking of any of Petitioner's property, as he never owned the punitive damage award in question. This is the heart of Petitioner's misunderstanding. The statute was amended prior to the accrual of Petitioner's cause of action. The fact that the trial judge mistakenly did not enter the original final judgment in accordance with the law does not bestow a property right upon Petitioner, and the trial judge is not precluded from correcting that mistake by amending the final judgment. Nor is any federal Constitutional provision implicated by this action.

Punitive damages under Florida law are subject to legislative direction and control. Prior to the accrual of Petitioner's cause of action, the Florida Legislature enacted a tort reform act which changed the amounts and percentage a claimant is entitled to receive in a civil action. The Petitioner undertook this case with the statute as the controlling law. Petitioner never had a right to receive more than forty percent (40%) of the punitive damage award. His claim is therefore flawed in its premise and disingenuous in arguing that because final judgment for the entire punitive damage award was erroneously entered in his favor he was thereby vested with a property right of constitutional dimensions. Unless this Court is prepared to conclude that all citizens have a federal constitutional right to punitive damages with which the states may not interfere, the Petition should be denied.

ARGUMENT

I.

SECTION 768.73(2), FLA.STAT. (1991), REQUIRING SIXTY (60%) PERCENT OF ANY PUNITIVE DAMAGE AWARD BE MADE PAYABLE TO A STATE FUND DOES NOT CONSTITUTE A TAKING OF PRIVATE PROPERTY.

Petitioner appears to be continuing to assert a property taking because a final judgment for the entire amount of the punitive damage award was erroneously entered by the trial court in his favor. The Third District Court of Appeal in *Gordon v. State,* 585 So.2d 1033 (Fla. 3d DCA 1991) disposed of this contention as follows:

> We relegate to a footnote the claim that Gordon obtained a constitutionally vested right to 100% of the punitive damages when the initial judgment for that amount was entered in his favor. Because the judgment was obviously erroneously entered as in contravention of a contrary statute, this contention is equivalent to stating that no judgment may constitutionally be corrected or reversed on appeal.

Id. at 1037.

The Florida Supreme Court in a per curiam decision upheld the District Court of Appeal's decision in this case. *Gordon v. State,* 608 So.2d 800 (Fla. 1992). Because the Florida decision turned on a determination of what constitutes a property interest under Florida law, no federal constitutional issue is implicated.

As to a more generalized due process property argument regarding an inchoate claim for punitive damages, the Florida courts properly concluded that as long as the statute was applied in a prospective manner no property interest was infringed. The Florida Third District Court of Appeal concluded as follows:

> The appellant's first claim that the statute constitutes an unconstitutional "taking" of a property right without due process — is wholly without merit. This is true simply because he has no cognizable, protectable right to the recovery of punitive damages at all. Unlike the right to compensatory damages...[citations omitted], the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature.

585 So.2d at 1035, *affirmed,* 608 So.2d at 801.

Petitioner's argument is nothing more than a naked assertion of what he thinks he should receive under the law. As he states, "Gordon had a reasonable economic expectation to receive the fruits of the entire judgment...." (Petition at 16). Petitioner's disagreement with a discretionary legislative decree is not elevated to a protected constitutional interest because he feels he had a "reasonable economic expectation." The statute was in effect even prior to the accrual of his cause of action. From what source does his "economic expectation" spring? Petitioner's argument is totally frivolous.

II.

THE EIGHTH AMENDMENT HAS NO APPLICATION IN THIS CASE.

Petitioner's Eighth Amendment argument is again based upon a faulty premise. Only if Petitioner had a property interest which the government then exacted would an excessive fines analysis have ever potential application. A tort defendant having a punitive damage award imposed against him in a jurisdiction recognizing state sharing potentially might have an Excessive Fines Clause argument, although that issue was not adjudicated. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2902, 492 U.S. 257 (1989). Petitioner has no standing to make such an argument. Petitioner's Eighth Amendment argument is without merit.

III.

FLORIDA PUNITIVE DAMAGES STATUTE BEARS A RATIONAL RELATIONSHIP TO A LEGITIMATE LEGISLATIVE INTEREST.

Petitioner concludes his constitutional trilogy with a substantive Due Process Claim. The standard for evaluating substantive due process challenges to social and economic legislation is virtually identical to the "rational relationship" test for evaluating equal protection claims. Legislation such as is involved in this case will be upheld against a substantive due process attack unless the legislation "manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor,* 363 U.S. 603, 611 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435 (1960). As with the "rational relationship" test, any plausible reason supporting Congress' action in enacting the suspect legislation satisfies the "rational basis" test. *Id.* at 612, 80 S.Ct. at 1373.

With regard to the statute under attack herein, the Florida Supreme Court concluded:

> We agree with the trial court (sic) that no substantive due process violation occurred. The statute under attack here bears a rational-relationship to legitimate legislative objectives: to allot to the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney.

608 So.2d at 802.

Petitioner contends that allowing the State a share of the punitive damage award does not rationally promote the State's asserted interest in deterring future harm to the public. (Petitioner at 18). However, he fails to explain how a wrongdoer who has had to pay a punitive damage award is any less deterred if a portion of the award goes to the State instead of the plaintiff. See, for example, the concurring opinion of Justice Shores in *Fuller v. Preferred Risk Life Insurance Co.*, 577 So.2d 878 (Ala. 1991). In responding to the criticism that punitive damages awards sometimes amount to an undeserved windfall to a plaintiff, Justice Shores concluded that "directing the defendant to pay a part of a punitive damages award to the State general fund or any special fund devoted to the furtherance of justice on behalf of all the people...in proper cases could serve the purpose for which punitive damages were authorized to a greater degree than would allowing the plaintiff to receive the entire amount." *Id.* at 887. The remainder of Petitioner's speculation as to why the statute is not rationally related to the proper legislative goals enumerated by the Florida courts consists entirely of self-serving conclusions about the motivational effect of the statute on human nature and is unsupported by logic or any empirical data. And even if

Petitioner's argument made any sense, the statute would still not be utterly lacking in a rational justification so as to warrant this Court's review. The fact that the state legislature's action is fairly debatable as to whether such social legislation will have the intended result does not result in a conclusion that the statute "manifests a patently arbitrary classification."

One further remark may assist the Court in making its review decision in this case. Petitioner raises the specter of interstate conflict on a federal question by citation to the Colorado Supreme Court's decision in *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991). A careful review of the *Kirk* decision assists in understanding why the Florida Supreme Court's interpretation of the punitive damages statute is constitutionally correct and why there is no conflict on a federal question. The Florida Supreme Court concluded that there is no property right to the recovery of punitive damages. The Florida Statute requires that the state and the claimant's interest in the punitive damage award vest simultaneously, that is, upon entry of the final judgment. Thus, the state deprives the claimant of no property, rather it shares the entitlement to such an award. The language of the Florida Statute is susceptible to this interpretation and is consistent with the rule of statutory construction that a law should be construed in a manner that is consistent with its constitutionality.

The Colorado Supreme Court interpreted its statute differently. That Court construed the language of the Colorado statute as allowing vesting of a property right in a claimant which the State then divests in a constitutionally impermissible manner. Thus, the distinction between the two states' decisions lies in the conclusory premise of whether a property interest vests in a claimant or not. This alternative interpretation was ably explicated by Chief Justice Rovira in the Colorado decision. *Id.* at 273-276. The Colorado Chief

Justice pointed out how the Colorado statue could be constitutionally construed. In any case, the Colorado Legislature could permissibly rewrite the Colorado statute to comport with constitutional concerns. Thus, the Colorado decision provides Petitioner with no solace, and there is no federal question conflict between these two state court decisions.

CONCLUSION

The Florida Supreme Court's decision in *Gordon v. State, et al.*, examined the nature of an inchoate claim to punitive damages and concluded that § 768.73(2), Fla.Stat. (1991), applied prospectively, as it was in this case, does not infringe on any property interests under Florida law. Accordingly, no constitutional property right of Petitioner was violated, nor was the Excessive Fines Clause of the Eighth Amendment implicated. The Florida Supreme Court further concluded that the statute furthered legitimate legislative objectives, and therefore was not constitutionally infirm. Petitioner has failed to demonstrate any sound reason why this Court should exercise its discretionary review authority. Under these circumstances, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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